

For discussion on
25 September 2006

Legislative Council Panel on Manpower

Proposal to amend the Employment Ordinance to adequately express the policy intention concerning the calculation of statutory entitlements and to improve the mode of calculation of such entitlements

Purpose

This paper briefs Members on a proposal to amend the Employment Ordinance (“EO”) to clearly reflect the policy intention concerning the calculation of statutory entitlements and to improve the mode of calculation of such entitlements. Details of the proposal are set out in paragraph 6 below.

Background

2. At the meeting of the Legislative Council (LegCo) Panel on Manpower held on 20 July 2006, we updated Members on the progress on a proposal to amend the EO to clearly reflect the Government’s policy intention that all components of “wages”, including commission of a contractual nature, however designated or calculated, are to be reckoned for the purpose of calculating statutory entitlements. We also took the opportunity to brief Members on the views of business and professional organisations as well as those of labour groups and unions on the proposal.

3. In the course of consultation over the past few months, the seasonal and fluctuating nature of commission, particularly in the retail, real estate and finance sectors was repeatedly highlighted by the business and professional organisations. They quoted as an example that the peak seasons of the car sale business fell towards the year-end. It would be both unfair and costly to an employer of the trade if his sales teams exhaust their annual leaves immediately after the peak seasons, thereby boosting the average daily wages to be adopted in calculating their annual leave pay. The same problem may arise in a stock brokerage firm should its marketing teams proceed on annual leave immediately after the conclusion of an Initial Public Offering exercise from where they have derived very handsome commission.

4. We acknowledge the concerns of business and professional organisations on the difficulty in staff cost budgeting under the existing mode of calculation of statutory benefits as it only makes reference to the average daily wages earned by an employee during the most recent wage period, which is usually one month. The average daily wages calculated under this mode may be subject to seasonal fluctuations and difficult to predict with any degree of certainty. For this reason, it would appear reasonable to adopt the average daily wages calculated on the basis of a 12-month moving average. The adoption of a longer reference period of 12 months is considered more desirable because:

- (a) it would avoid over-reliance on recent achievements at the expense of performance over time;
- (b) in most cases, 12 months would be sufficient to encompass a full business cycle comprising both the peak and slack seasons. Extreme values of commission earned can be evened out and the average daily wages calculated with a 12-month reference period would be more stable and predictable;
- (c) a more stable and predictable basis for calculation would be conducive to business planning and cost budgeting on the part of employers; and
- (d) stability and predictability in payment / earnings would be beneficial to both employers and employees.

Proposal

5. The policy intention regarding the calculation of statutory entitlements of employees under the EO is that “wages” inclusive of commission of a contractual nature should be used as the basis for all calculations. According to the Court of Final Appeal's ruling, commission accrued and calculated on a monthly basis is not to be reckoned in the calculation of holiday pay and annual leave pay because the EO does not provide for a “workable mode of calculation”. There is therefore a need to amend the EO so as to ensure that a “workable mode of calculation” is available for the calculation of statutory entitlements in all cases involving commission of a contractual nature. Apart from amending the EO to reflect the policy intention concerning the calculation of statutory entitlements, we consider it necessary, in the light of the views received in the course of the consultation exercise during the past few months, to also amend the EO such that the average daily wages on the basis of a 12-month moving average is used for the purpose of calculating statutory entitlements.

6. Accordingly, we propose to amend the EO as follows:
- (a) to put beyond doubt that all components of “wages”, including commission of a contractual nature, however designated or calculated, are to be reckoned for the purpose of calculating the following statutory entitlements under the EO:
 - (i) holiday pay;
 - (ii) annual leave pay;
 - (iii) maternity leave pay;
 - (iv) sickness allowance;
 - (v) wages in lieu of notice for termination; and
 - (vi) end-of-year payment; and
 - (b) to modify the existing mode of calculation of the above statutory entitlements by making reference to the average daily wages earned by an employee during the 12-month period, or such lesser period when the employee is under the employment of the concerned employer, immediately preceding the statutory holiday, first day of the annual leave, or other relevant dates.

Way Forward

7. The proposal set out in paragraph 6 above received majority support of the members present at the meeting of the Labour Advisory Board on 22 August 2006. Our plan is to introduce an amendment bill into LegCo to give effect to the proposal as early as possible in the 2006-07 legislative session.

Economic Development and Labour Bureau
Labour Department
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